Office-Supreme Court, U. S.
FILED
JUL 25 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 44 Misc.

JOHN R. BROOKS,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH WALKER,
Attorney for Respondent.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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Preliminary Statement

The United States Court of Appeals for the Second Circuit unanimously affirmed the decision of the District Court which granted summary judgment to the respondent dismissing the complaint herein, said complaint having been brought for alleged misdelivery of a shipment moving in interstate commerce under a uniform domestic bill of lading.* The respondent's answer consists, among other things, of a general denial and affirmative defenses of (1) delivery, and (2) *res adjudicata.* The District Court found that the facts, on proof by documentary evidence, showed that the respondent had performed its contract through delivery to petitioner's authorized agent. The Court of Appeals also found that there was no genuine issue of material fact so as to prevent an award of summary judgment.

* Reported in 187 Fed. (2) 869.

Petitioner having failed to establish, in the Courts below, any material question of fact, now seeks in this Court a review of the power of a Federal Court to grant summary judgment, a remedy which is specifically provided by Rule 56 of the Rules of Civil Procedure. There is here no legal question, novel or otherwise, and petitioner has shown nothing which should move this Court to grant certiorari.

The Facts

Petitioner on October 4, 1945 shipped 11 cartons, 1 case and 1 package of books and household goods from New York City, destination Laredo, Texas and consigned to himself. The uniform straight bill of lading, copy of which is annexed to both the respondent's answer [item 4*] and the respondent's motion papers on the motion for summary judgment [item 5] clearly shows that the destination for the rail carriage of the shipment was Laredo, Texas. The petitioner, having gone to Guadalajara, Mexico, hired a customs broker and transportation agency known as The Corrigan Dispatch Company [operated by one Edward H. Corrigan] and by letter dated October 19, 1945 [Ex. C, subd. e, of item 5] petitioner wrote to said Corrigan Dispatch Company and sent to it the bill of lading covering the shipment to Laredo, asking Corrigan to arrange to forward the shipment to petitioner at Guadalajara. The petitioner thus constituted The Corrigan Dispatch Company as his agent to receive and direct the goods.

Delivery was made by the Texas & Mexican Railway the final rail carrier, to The Corrigan Dispatch Company at Laredo [Ex. C., subd. b, of item 5] and the latter forwarded the goods by truck to Guadalajara under a new bill of lad-

* References are to items contained in Record on Appeal in the United States Court of Appeals, as listed in index thereof.

ing which The Corrigan Dispatch Company sent with draft attached to the National Bank of Mexico at Guadalajara, giving petitioner notice by letter dated November 28, 1945 [Ex. C, subd. d, of item 5]. The petitioner paid the draft and telegraphed Corrigan Dispatch on December 4, 1945 that he had done so [Ex. C, subd. e, of item 5]. The letter of the petitioner dated October 19, 1945, the delivery receipt of the final rail carrier [Texas Mexican Railroad Company], the letter dated November 28, 1945 from The Corrigan Dispatch Company to the petitioner and the petitioner's Western Union Telegram dated December 4, 1945 to The Corrigan Dispatch Company stand admitted [Ex. C of item 5].

The petitioner instituted two prior actions in connection with this same shipment and the history of those two actions are set forth in his complaint herein [item 3]. The simple fact of delivery to the petitioner's own agent at Laredo was established before the Court in Texas in the first of the prior actions and established the defense of the delivering carrier who, under the law, would have been liable on behalf of the rail carriers for any misdelivery of such an interstate shipment, if any such misdelivery had occurred. In the second action that judgment was held binding upon the petitioner and the action as against the delivering carrier was again dismissed. Those adjudications are the basis of the respondent's defense of *res adjudicata* as set forth in the answer herein [item 4].

POINT I

Rule 56 of the Rules of Civil Procedure provides for the granting of summary judgment upon application of a defendant where the Court shall find that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is provided under Rule 56 of the Rules of Civil Procedure, subdivision (b) of which provides:

> "FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

That rule also provides [subd. (c)]:

> "* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *"

In *Engl* v. *Aetna Life Ins. Co.*, 139 F. [2d] 469, the Court said:

> "But the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions and admissions on file show that there are no genuine issues of facts to be tried.' * * * Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision

are insufficient to prevent the award of summary judgment [citing cases].

"In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back * * *. If one may thus reserve ones evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formerly raised were in fact sham or otherwise unsubstantial. * * *"

See also:

Madeirense Do Brasil S/A v. *Stulman-Emrick Lumber Co.*, 147 Fed. (2) 399; certiorari denied 325 U. S. 861.

The petitioner cannot be heard to complain if he failed to offer proof to raise a genuine issue of fact on the motion for summary judgment. In the circumstances the District Court was more than justified in granting the motion, was empowered to do so under Rule 56 of the Rules of Civil Procedure and there is therefore no question for review by this Court.

POINT II

Delivery of the shipment was accomplished by delivery to the petitioner's agent.

Delivery by a common carrier may be made to the owner or his agent.

Sweet v. *Barney*, 23 N. Y. 335, 338.

The proof conclusively showed that The Corrigan Dispatch Company was the authorized agent of the petitioner,

whose letter of October 19, 1945 was a direct authorization to The Corrigan Dispatch Company to handle the shipment for the petitioner, that letter containing the original bill of lading covering the rail shipment to Laredo, Texas. The delivery of the bill of lading and the request to The Corrigan Dispatch Company to act on the petitioner's behalf clearly constituted Corrigan the agent of the petitioner.

> "But to justify delivery to an agent no further or other proof of the fact of the agency is required that is necessary in other cases."
>
> Hutchison on Carriers (3rd Ed., Vol. II, p. 754, § 674).

If delivery to The Corrigan Dispatch Company, in the face of the facts, could possibly have been held to be a misdelivery then the petitioner ratified that delivery. Instead of petitioner disclaiming the right of The Corrigan Dispatch Company to act on his behalf, upon receipt of the letter from The Corrigan Dispatch Company dated November 28, 1945 [which contained both a copy of the draft and the documents covering the further shipment of the goods by truck from Laredo to Guadalajara, thus notifying petitioner of the steps which The Corrigan Dispatch Company had taken in connection with the shipment], he went to the bank, paid the draft, picked up the bill of lading for the truck movement from Laredo to Guadalajara* and telegraphed further instructions to The Corrigan Dispatch Company by telegram dated December 4, 1945. These actions of the petitioner clearly constituted a ratification of the delivery made to The Corrigan Dispatch Company as his agent.

See:

Pere Marquette Rail v. *J. F. French & Co.*, 254 U. S. 538;

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* See complaint [item 3] p. 2.

A. D. Blowers & Co. v. *Canadian Pac. R.*, 155 Fed. 935;
The Daytonian, 1933 A. M. C. 359 (U. S. D. C., S. D. of N. Y.).

POINT III

The judgment in favor of the delivering carrier in the original suit instituted in the United States District Court for Southern Texas, Laredo Division, determined the liability of all carriers in the rail movement from New York to Laredo and bars any recovery in this action.

The shipment in question was an interstate commerce shipment governed by the Interstate Commerce Act and the liability of the rail carriers was that provided in Title 49, U. S. C. A. § 20(11) which section provides that the owner or consignee may sue the originating or the delivering carrier for the through liability of all carriers involved in the transportation.

Atlantic Coastline v. *Riverside Mills*, 219 U. S. 186, 196, 200 (originating carrier liability);
Panhandle & S. F. Ry. v. *Montgomery*, 140 S. W. (2) 241, 245 (delivering carrier liability);
Bancroft v. *Yazoo & M. V. R. Co.*, 193 So. 481, 482 (delivering carrier liability).

Thus petitioner could have sued the Texas & Mexican Railway Company [delivering rail carrier at Laredo] or The Pennsylvania Railroad Company [originating carrier]. He cannot, however, sue both for the same liability and the determination of the carriers' liability as against one of them is determinative as against all the carriers. The judgment against the petitioner in favor of The Texas &

Mexican Railway Company [delivering carrier] estops petitioner from suing The Pennsylvania Railroad Company [initial carrier] on the same claim.

See:

Brown v. *Wabash R. Co.*, 281 S. W. 64.

C/F:

Arnold Milling Co. v. *Commodity Credit Corp. and Atchison, Topeka & Santa Fe Ry. Co.*, 81 F. Supp. 889.

* * * * * *

Petitioner argues in his brief on this application that there was an issue of fact as to whether the destination of the shipment was Laredo or Mexico City. The bill of lading clearly shows the destination of the shipment to have been Laredo. But even if there were a question of fact as to what the destination of the shipment was it would be immaterial in this case because no liability can attach to a carrier for delivery to an owner or consignee or the agent of such owner or consignee at a point other than the destination. Acceptance of delivery at Laredo by petitioner's agent discharged the carriers from further transportation under the bill of lading in any event.

> "So long as the goods remained the property of the bailor (shipper) he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their re-delivery to himself * * *."
>
> "* * * So clearly the owner would have the right, while no new interests have intervened and subject to the carrier's claim for full freight, to intercept the goods upon their journey and demand their delivery at any reasonable point upon the carrier's line short of the original destination * * *."

Hutchison on Carriers (3rd Ed.), §§ 660 and 661; 13 C. J. S. §§ 164, 166;

Sweet v. *Barney, supra;*
Hayman v. *Can. Pac. R. R.*, 43 Misc. 74; 86 N. Y. S. 728;
Parsons v. *Hardy & M'Cormick*, 14 Wend. (N. Y.) 215.

There is nothing in the petitioner's application herein, just as there was nothing in the affidavits or briefs on the motion below, which would justify any different result than was arrived at by the Courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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